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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1374

CHARLES PILUSO, *Petitioner,*

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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CHARLES PILUSO, *Petitioner,*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered on February 7, 1975, petition for rehearing was denied on March 4, 1975.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is attached to this Petition (Pet. App. 1a-7a). The Order denying the Petition for Rehearing and Rehearing En Banc is attached (Pet. App. 8a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 7, 1975, and Petition for Rehearing and Rehearing En Banc was denied on March 4, 1975. On March 20, 1975, Chief Justice Burger extended until May 3, 1975, the time within which to file certiorari (Pet. App. 29a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

I. Does an indictment charge an offense under the Travel Act and may a conviction be sustained when the indictment is premised on a violation of Title 18, U.S.C. § 215, as the " 'background' " identification of the alleged unlawful activities required by Title 18, U.S.C. § 1952 (b)(2)?

II. Does an indictment charge an offense under the Travel Act and may a conviction be sustained when the indictment is premised on a violation of Article 180 of the New York Penal Code as the "unlawful activity" as that term is used in Title 18, U.S.C. § 1952 (b)(2)?

III. Unless this Court agrees with the Court of Appeals that *both* Sec. 215 of Title 18 U.S.C. and Sec. 180 of the New York Penal Code constitute bribery and/or "unlawful activity" under Title 18, U.S.C. Sec. 1952 (b)(2) must not this Court under *Leary* v. *The United States*, 393 U.S. 631, 89 Sup.Ct. 532, award Petitioner a new trial?

IV. Is not a concededly erroneous instruction by the trial Judge to the jury, duly objected to, in which the

jury was advised that Petitioner was charged with a conspiracy to violate Sec. 215 of Title 18 U.S.C. prejudicial error which would require a new trial under this Court's ruling in *Bolenbach* v. *The United States,* 324 U.S. 837, 66 Sup.Ct. 402?[1]

STATEMENT OF THE CASE

The Petitioner, an attorney at law, was tried on three counts, the first count of which alleged a conspiracy to violate the Travel Act Title 18 Sec. 1952, the other two which charged substantive violations of the Travel Act, Title 18 U.S.C. Sec. 1952. The conspiracy count alleged that from July 1, 1967 to the filing of the indictment, the Petitioner conspired with others to violate Title 18, U.S.C. Sec. 1952 by using interstate travel themselves and causing others to use interstate travel with intent to carry on "unlawful activity, said unlawful activity being the crimes of commercial bribery, in violation of the laws of the State of New York and the paying of commissions to an officer of a bank the deposits of which were insured by the Federal Deposit Insurance Corporation for procuring loans from said bank in violation of Title 18, U.S.C. Sec. 215." (Pet. App. 10a-14a). The Petitioner filed a motion to dismiss the indictment asserting that the background

[1] The first two questions presented in this Petition are common and identical to the questions presented by the co-defendant in his Petition pending in this Court, *Louis Pomponio* vs. *The United States,* cert. pending No. 74-1260. That Petition for Certiorari challenges the correctness of the Court of Appeals opinion reversing the ruling of Judge Bryan which held the indictment in this case did not charge an offense under the Travel Act since neither Title 18, U.S.C. § 215 or Article 180 of the New York Penal Code constituted unlawful activity under the Travel Act. Petitioner herein adopts all of the arguments of the co-defendant in his Petition for Certiorari pending in this Court.

identification offenses namely Sec. 180 of the New York Penal Code and Sec. 215 of Title 18, U.S.C. failed to charge offenses which would constitute unlawful activities within the meaning of the Travel Act (Pet. App. 15a-26a). The Co-defendant, Louis Pomponio's trial was severed from that of Petitioner. Petitioner went to trial before Judge Oren R. Lewis of the United States District Court of the Eastern District of Virginia, who overruled the Petitioner's motion to dismiss the indictment for failure to charge an offense under the Travel Act. The case was submitted to the jury over Petitioner's objection and the jury was instructed by this Court that both Sec. 180 of the New York Penal Code and Sec. 215 of Title 18, U.S.C. were unlawful activities within the purview of Title 18, U.S.C. Sec. 1952.

The Petitioner's Co-defendant, whose case was severed was tried before Judge Bryan who expressed disagreement with Judge Lewis' ruling on the validity of the indictment under the Travel Act but stated he felt bound by his ruling. The Co-defendant Louis Pompanio was convicted and Judge Albert Bryan on May 17, 1974 pursuant to Rule 34 of the Federal Rules of Criminal Procedure granted an arrest of judgment in which he stated: "Sec. 215 of Title 18, U.S.C. and the New York Penal Code, in my view, do not come within the unlawful activity definition of Sec. 1952 of Title 18." (Pet. App. 8a-9a) See Slip Op. of the United States Court of Appeals Fourth Circuit (Pet. App. 4a).

The trial Judge instructed the jury on the Travel Act and its relationship to the unlawful activities which under this indictment stated, "that the defendant's would travel and wilfully cause others to

travel * * * with intent to promote, manage, establish and carry on * * * said unlawful activity being the crimes of commercial bribery, in violation of the laws in the State of New York and the paying of commissions to an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, for procuring loans from said bank in violation of Title 18, U.S. Code, Sec. 215. * * * (i.e., The paying of commission is not made criminal by § 215 of Title 18. The criminal sanctions apply only to the receiver of the commission, etc.) The Trial Judge also erroneously told the jury that the Petitioner was being charged with conspiracy to violate Sec. 215 of Title 18, U.S.C. (Pet. App. 27a). Petitioner objected to this erroneous statement to the jury on the role of Sec. 215 of Title 18, U.S.C. in the indictment. The trial Judge refused to correct same (Pet. App. 27a). The Government in its brief in the Court of Appeals for the Fourth Circuit conceded that the instruction was erroneous but contended that it was harmless error. The Petitioner was convicted on all three counts and sentenced to two years in the penitentiary. Petitioner noted his appeal to the United States Court of Appeals for the Fourth Circuit and the Government noted their appeal in the companion case of *The United States* v. *Louis Pomponio* from the decision of Judge Bryan granting the arrest of judgment.

The United States Court of Appeals for the Fourth Circuit on February 7, 1975, rendered an opinion after consolidating Petitioner's case with that of the Co-defendant, Louis Pomponio, in which it affirmed the judgment of conviction as to the Petitioner and reversed the judgment of Judge Bryan which had

granted an arrest of judgment, as to the co-defendant Louis Pomponio. Judge Bryan held that Sec. 215, Title 18, U.S.C. and Sec. 180 of the New York Penal Code could not be made the basis for the invocation of the Travel Act. The Petition for Certiorari of the Co-defendant, Louis Pomponio, is pending in this Court No. 74-1260. The Chief Justice granted this Petitioner an extension of time until May 3, 1975, within which to file a Petition for Certiorari. (Pet. App. 29a)

STATUTES AND RULES INVOLVED

Title 18, United States Code

§ 215. Receipt of commissions or gifts for procuring loans.

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, § 1952, U.S.C. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promote, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

New York Penal Law

§ 180 Commercial bribing.

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employee or principal with intent to influence his conduct in relation to his employee's or principal's affairs.

Commercial Bribing is Class B misdemeanor.

§ 200.0 Bribery

A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribery is a class D felony.

* * *

§ 70.15 Sentences of imprisonment for misdemeanors and violation

* * *

2. Class B misdemeanor. A sentence of imprisonment for a class B misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed three months.

§ 70.00 Indeterminate sentence of imprisonment for felony

* * *

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

* * *

(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years. . . .

* * * * *

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

The Opinion of the United States Court of Appeals for the Fourth Circuit Which Reversed the Ruling of Judge Bryan Who Held That the Instant Indictment Failed To Charge An Offense Under the Travel Act, and Which Affirmed the Contrary Ruling of Judge Lewis from the Same Court Who Held That the Federal Misdemeanor Title 18, U.S.C., Sec. 215, Constituted Bribery or Unlawful Activity Under the Travel Act Is Contrary to This Court's Ruling in U. S. v. Nardello, 393 U.S. 286, Rewis v. The United States, 401 U.S. 808, and the Legislative History of Both Title 18, U.S.C., Sec. 1952 and Sec. 215.

This issue presents a substantial question over the proper construction of the Travel Act where the jurisdiction is predicated on a federal conflict of interest

statute which proscribed a punishment for the receiver of a gratuity when he is an officer of a Federally Insured Bank. Two District Judges in the same court reached opposite conclusions on whether Sec. 215 of Title 18, U.S.C., could be made the basis of unlawful activity under the Travel Act, see *Louis Pomponio* v. *The United States,* U. S. No. 74-1260, cert pending.

The legislative history of Sec. 215 of Title 18, U.S.C. clearly establishes that this federal misdemeanor was a conflict of interest statute and not a bribery statute. The gravamen of Sec. 215 of Title 18, U.S.C. is not bribery or bribery in the "generic" sense. There is no penalty proscribed for the payor as there is in all bribery statutes. It has its origin in the Federal Reserve Act of 1913 (63rd Congress, December 23, 1913, 38 Stat. 272). Title 18, U.S.C. Sec. 215 makes it a misdemeanor and relates to advantage which a bank officer "by reason of his position of * * * influence or trust exacts from another. Violation of such statutes are generically classified "graft" rather than bribery. In House Report 69, 63rd Congress, First Session 1913, the following is stated:

> "In this section it is sought to correct a bad practice, all to prevalent, of paying fees to bank examiners in order that they may make a favorable report upon the condition of the bank; and further to end the illegitimate practice whereby officers of national banks have heretofore profited at the expense of borrowers by charging a commission or brokerage for the obtaining of loans. The extent of these practices cannot be stated, but that they prevail is certain; and it is equally clear that they are opposed to public welfare and

to sound banking, beside being wholly at variance with fundamental conduct. See *U. S.* v. *Lane,* 456 F.2d 593."

Judge Bryan who granted the arrest of judgment of the co-defendant's case was precisely correct when he stated:

> "I will therefore in accordance with Rule 34 arrest the judgment on the specific ground * * * the specific ground of the arrest of judgment is that the indictment, *counts 1, 5, and 9 do not charge an offense and the reason I am of the view that they do not charge an offense is because the unlawful activity referred to in the indictment as being promoted or furthered by the Defendant, Louis J. Pomponio, Jr.,* namely, § 215 of Title 18, U.S.C. and the New York Penal Code, *in my view, do not come within the unlawful activity definition of § 1952 of Title 18, U.S.C.*"

The Court of Appeals in holding that § 215 of Title 18, U.S.C. was unlawful activity within the meaning of the of the Travel Act stated:

> "The defendants further contend that since 18 U.S.C. § 215 criminalizes only the act of the bank officer who receives the proscribed thing of value, they as payors could not be convicted of an offense under that statute and, accordingly, it was improperly designated as an "unlawful activity" in the indictment. As pointed out in *United States* v. *Wechsler,* 392 F.2d 344 (Fourth Cir. 1968), the fallacy in such an argument lies in a too heavy reliance on the role played by § 215 in the indictment, and elides the fact that it serves "only as a background identification of the unlawful activities."

The judicial construction of this section as a conflict of interest statute is reflected in the decision of

the United States Court of Appeals for the Eighth Circuit in *United States* v. *Lane*, 464 F.2d 953, wherein the Court of Appeals stated:

> "It seems clear to us that the purpose of the Act was to protect the deposits of banks having federal insurance by preventing unsound and the improvident loans to be made from such deposits by officers and directors of the bank. * * * *In such a case, the banker is violating a position of trust that he owes to the bank.*"

There has always been a distinction between graft and bribery. Graft means an advantage which one person by reason of his peculiar position of superiority, influences, or trust exacts from another. See *Razette* v. *The United States*, 199 F.2d 44 (6th Cir.), cert. denied 344 U.S. 904 (1952). See *Craig* v. *Warren*, 99 Minn. 246, 109 N.W. 231.

While Sec. 215 of Title 18, U.S.C. only makes criminal the recipient of the gratuity and not the payor of the gratuity the indictment in this case affirmed by the Court of Appeals purported to charge a federal offense under the Travel Act by invoking § 215 of Title 18, U.S.C. as the bribery or unlawful activity. The conspiracy count alleged a conspiracy to violate the Travel Act, and charged that the unlawful activity was "the paying of commissions to an officer of the bank, deposits of which were insured * * * in violation of Title 18, U.S.C. § 215." While this does not even charge a violation of Title 18, U.S.C. § 215, *it was not even described as bribery in the conspiracy count.* The Government, however, did charge that it constituted bribery in the two substantive counts 5 and 9. In the two substantive counts, the language used, was "did unlawfully * * * travel * * * with

intent to * * * said unlawful activity being the crime of bribery in violation of the laws of the State of New York (New York Penal Law, Article 180) and of the United States Title 18, U.S.C. § 215.

The Court of Appeals is reversing the dismissal of the indictment by Judge Bryan and affirming the contrary decision of Judge Lewis in the same court, held that although as payors the Defendants could not be convicted under § 215 of Title 18, U.S.C., it nevertheless qualified as a "background identification offense" to support the jurisdiction of the Travel Act by stating (Pet. App. 6a-7a):

> "The defendants further contend that since Title 18, U.S.C. § 215 criminalizes only the act of the bank officer who receives the proscribed thing of value they, as payors, could not be convicted of an offense under that statute, and, accordingly it was improperly designated as an unlawful activity in the indictment * * *. The 'unlawful activity' specified within the Act may be bribery under either State or Federal law and reference to such law is necessary only to identify the type of 'unlawful activity' in which the defendants intended to engage. Proof that the unlawful objective was accomplished or that the referenced law has been violated is not a necessary element of the offense defined in § 1952. * * * Accordingly, we find it sufficient that the indictment charged the defendant with inter state travel with the intent inter alia to facilitate the violation of the federal statute."

The ruling below constitutes a departure from the warnings of this Court in *Rewis* v. *The United States*, 401 U.S. 808, 91 S.Ct. 1056 (1971), and constitutes an enlargement of Travel Act jurisdiction beyond what

the legislative history plainly indicates that the Travel Act was concerned with but such a construction also serves to obstruct and bring into conflict sentencing potentials proscribed by Congress when it enacted Title 18, U.S.C. § 215, and Title 18, U.S.C. § 371. See Hearing on S. 1653-1658, S. 1665. Before the Senate Committee on the Judiciary, 87 Cong. 1st Sess.

This Court concluded its warning in the *Rewis* case *supra,* when it stated:

> "In short, neither statutory language nor legislative history supports such a broad ranging interpretation of § 1952. And, even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, citing *Bell* v. *The United States,* 349 U.S. 1, 75 S.Ct. 620."

The present opinion not only obstructs sensitive federal-state relations in dealing with the New York misdemeanor statute of commercial bribery Article 180, which is escalates from a misdemeanor punishable by three (3) months in jail into federal felony, it also seriously conflicts with the prior expressed will of Congress in proscribing criminal penalties with respect to Title 18, U.S.C. § 215 and Title 18, U.S.C. § 381. Congress made Title 18, U.S.C. § 215, a federal misdemeanor punishable by a fine of not more than 5,000 or imprisonment for not more than one (1) year or both. The Court of Appeals by allowing § 215 of Title 18, U.S.C. to be used as a " 'background identification offense' " for the invocation of The Travel Act has escalated the misdemeanor into a felony with a potential sentence of a fine of not more than $10,000

and imprisonment for not more than five (5) years *or both.*

Congress, in passing Title 18, U.S.C. § 371, the general conspiracy count expressly provided in that statute that the penalty for the substantive statute for which the conspiracy is directed. In this case, if the petitioner had been charged with a conspiracy to violate § 215, the maximum penalty for such a conspiracy would be one (1) year—which is the maximum provided by § 215.

However, by charging conspiracy to violate § 1952, which in turn, is based on § 215, as the unlawful activity, the petitioner has become exposed to the five (5) year penalty provided in § 1952. Certainly Congress did not intend by passing the Travel Act to escalate the penalties provided for by Congress in prior enactments.

The Court of Appeals disposed of this argument by citation to decisions of the Second and Seventh Circuits in *U. S.* v. *Karigiannis,* 430 F.2d 138 (7th Cir. 1970), *U.S.* v. *Brennan,* 394 F.2d 151 (2nd Cir. 1968).

We suggest that the decisions cited by the Court of Appeals refer to the misdemeanors outlined in § 1952 (b)(1) which only invoke the Travel Act if part of a continuous enterprise (see Argument, *infra* p. 18). They have no bearing on the three felonies outlined in § 1952(b)(2), extortion, bribery, and arson which are invariably felonies under state and federal law.

Bearing in mind that all criminal statutes, *U.S.* v. *Bass,* 404 U.S. 336, *U.S.* v. *Emmons,* 410 U.S. 396, should be narrowly construed, this case presents an

issue of great importance involving the proper and consistent interpretation of the Travel Act and this Court's past constructions of it. We ask this Court to grant the writ of certiorari in light of the substantial question presented on the proper construction of the Travel Act, Title 18, U.S.C. § 1952; because of the conflicts existent in the lower federal Courts and because the ruling is contrary to this Court's past pronouncements on the proper scope and interpretation of the Act. *U.S.* v. *Nardello,* 393 U.S. 286 (1969); *Erlenbaugh* v. *U.S.;* 409 U.S. 239 (1972); *Rewis* v. *U.S.,* 401 U.S. 808 (1971).

II.

The Existing Conflict Among District Judges in the Southern District of New York, see U.S. v. Niedelman, 356 F.Supp. 979 contra: U.S. v. Maiolo, 72 Cr. 1123; U.S. v. Endresen, 73 Cr. 85; U.S. v. Hohn, 72 Cr. 1124; and U.S. v. Callahan, 72 Cr. 1126 (All Unreported), the Conflict in the Instant Case Between the Judges in the Eastern District of Virginia as to Whether the Commercial Bribery Statute of New York, Article 180, Bribery Within the Meaning of Title 18, U.S.C. Sec. 1952(b)(2) and This Court's Decision in Nardello v. The United States, 393 U.S. 286, 89 Sup.Ct. Rep. 534, Should Be Resolved by This Court.

The Court of Appeals opinion is the first appellate ruling that Sec. 180 of the New York Penal Code defining the misdemeanor commercial briberty is substantively equal to bribery under Title 18, USC Sec. 1952 (b)(2) of The Travel Act. It is the first appellate holding that as distinguished from the misdemeanors and felonies outlined as unlawful activity in 1952 (b)(1) that a misdemeanor such as commercial bribery could qualify as an unlawful activity under

Title 18, U.S.C. 1952 (b)(2), which specifies three felonies, namely, bribery, extortion and arson.

The opinion of the United States Court of Appeals reversed the arrest of judgment entered by Judge Bryan for the Co-defendant, Louis Pomponio (cert. pending in this Court No. 74-1260), and rejected a similar ruling by Judge Knapp in the Southern District of New York, *United States* v. *Niedelman*, 356 Fed. Supp. 979 (1973). The Court of Appeals opinion we submit is predicated upon a misreading of this Court's decision in *United States* v. *Nardello, supra,* and is contrary to this Court's ruling in *Rewis* v. *The United States, supra.*

In light of the expansive treatment of The Travel Act by the Court of Appeals with respect to its equation of the misdemeanor of commercial bribery, Article 180 of the New York Code with the crime of bribery as outlined in Title 18, U.S.C. § 1952 (b)(2), the existing conflict among the District Judges in New York as to whether commercial bribery is bribery under § 1952 (b)(2) of the Travel Act, and the conflict between the District Judges in the instant case should prompt this Court to resolve an issue, important as it is to the proper construction of an important criminal statute such as the Travel Act.

The indictment in this case sought to invoke the provisions of Title 18, U.S.C. Sec. 1952 (b)(2), which prohibits travel to engage in the unlawful activity of *"extortion, bribery, or arson in violation of the laws of the state in which committed or of the United States."* It is to be noted that the offenses outlined in Sec. 1952 (b)(2) are invariably felonies

under state and federal law while the offenses in Sec. 1952 (b)(1) are a mixture of felonies and misdemeanors. In order for the offense in 1952 (b)(1) to invoke the Travel Act, they must be part of a continuous enterprise, see *United States* v. *Cozzette,* 441 Fed.2d 344 (9th Cir. 1971); *United States* v. *Teemer,* 214 F. Supp. 952 (d.w.Va. 1967). It is this section, not Sec. 1952 (b)(2) that the cases cited by the Court of Appeals were relevant when the Court of Appeals stated:

> "Finally, the defendants argue that our construction of the Act improperly escalates these underlying misdemeanors to federal felonies, but such a contention has been summarily rejected by the courts. *U.S.* v. *Karigiannis* 430 F.2d 148 (7th Cir. 1970), *U.S.* v. *Brennan* 394 F.2d 151 (2nd Cir. 1968)." (Pet 7a)

These decisions cited by the Court have specific relationships to the amalgam of misdemeanors outlined in Sec. 1952 (b)(1) such as prostitution, gambling and liquor violations which are often connected with organized crime. They have no application to the three specific felonies outlined in Sec. 1952 (b)(2), and as the legislative history plainly shows when Congress enacted Sec. 1952 (b)(2), Congress was discussing bribery in terms of the corruption of public officials an offense which is invariably a felony under a federal and state law. One violation of the offense outlined in Title 18 § 1952 (b)(2) invokes the jurisdiction of the Travel Act. It does not have to be a part of continuous enterprise as do the misdemeanors and felonies set forth in Title 18 § 1952 (b)(1). See *Marshall* v. *U.S.,* 355 F.2d 999 (9th Cir.), cert. denied, 385 U.S. 815. New York does have a general bribery stat-

ute involving public officials which is Sec. 200. It is a class D felony with a sentence of up to seven (7) years. The commercial bribery statute of New York which is a Class B misdemeanor, which carries a maximum term of imprisonment for three months and plainly was never contemplated by Congress as the bribery specified in Sec. 1952 (b)(2).

The Court of Appeals reliance on this Court's decision in the *United States* v. *Nardello, supra,* to conclude that commercial bribery is substantively equal to common law bribery insofar as the invocation of the Travel Act is concerned is a misreading of the Court's opinion in Nardello. In the Nardello case, this Court in dealing with a state crime which was labeled blackmail held that it was substantively equivalent to extortion and thus, could properly invoke the jurisdiction of the Travel Act of Sec. 1952 (b)(2). The Court of Appeals seized on the language of this Court in Nardello when it stated:

> "Paraphrasing the language of the Court in *Nardello,* "(i)n light of the scope of the congressional purpose we decline to give the term (bribery) an unnaturally narrow reading * * * and thus conclude that the acts for which (defendants) have been indicted fall within the generic term (bribery) as used in the Travel Act." 393 U.S. at 296.

We submit the opinion of the Court of Appeals has misread the import of this Court's ruling by equating this Court's holding that blackmail and extortion are substantively equal regardless of label and *applying this reasoning to hold that bribery and commercial bribery are substantively equal.* These two offenses are basically synonomous only in that the word bribery is common to both of them. While there is a simi-

larity of labels, there is a total dissimilarity in the substance of the crimes involved. Commercial bribery is a crime of rather recent vintage on the statute books of approximately thirteen (13) states. See 108 University of Pennsylvania Law Review, p. 848. It is totally distinguishable from common law bribery which the legislative history of Sec. 1952 (b)(2) plainly shows was what Congress was concerned with when the term bribery was used in the statute. This is conceded by the opinion of the Court of Appeals in their opinion (Pet. App. 5a).

The Court of Appeals in holding that commercial bribery constituted unlawful activity within the meaning of the Travel Act stated (Pet. App. 5a):

> "however, while the states and federal government have enacted statutes dealing with the corruption of public officials, they have also extended the concept of bribery into areas of private conduct which we think appropriately fall within the ambit of the Travel Act."

The refutation of this argument is reflected in footnote 11 of this Court's opinion in *U.S.* v. *Nardello, supra,* where the Court quoting from the Government's brief stated:

> "Bribery has traditionally focused upon corrupt activities of public officials."

The Court also in footnote 9 of the Nardello opinion excerpted from a letter dated August 7, 1961, from then Deputy Attorney General Byron R. White setting out the position of the Justice Department during the period when the Travel Act was under consideration. 393 U. S. at 292 n.g. In *U. S.* v. *Niedel-*

man, N.Y., Judge Knapp stated in holding § 180 to be outside the scope of the Travel Act:

> "As I read the Nardello decision, the Court laid down some rather clear guidelines for resolving such a question. Interpretation of the Travel Act, Nardello declared should have the effect of carrying forward two basic Congressional objectives: (1) to assist the states in fighting the deprivations of the organized underworld (393 U. S. at 290-292, 89 S.Ct. 534 and, (2) insofar as possible as to achieve an interpretation having a uniform effect throughout the nation (at 293-294, 89 S.Ct. 534). The interpretation urged by the Government in the case at bar would further neither of these objectives and would utterly thwart the second."
>
> "As to the first objective, the extensive Congressional hearing cited by the Court in Nardello and by respective counsel in the case at bar contain not so much as a hint that so called 'commercial bribery' (as opposed to the conventional bribery arson and extortion) was ever considered to be a typical tool of the underworld. * * * In other words, the interpretation of the Travel Act which the Government here urges would in some states have the drastic effect of converting a minor state offense into a major federal felony, while in other states it would have no effect whatever. * * * I need not—and for present purposes do not—question the Congress' power to create such a situation. *However, I find absolutely no evidence that Congress harbored any such intent.* Cf. *U. S.* v. *Bass* (1972), 404 U.S. 336, 92 S.Ct. 515, and *U. S.* v. *Enmons* (1973), 410 U.S. 396, 93 S.Ct. 1007."

As this Court warned in *Rewis* v. *U. S.*, 401 U.S. 808, 91 S.Ct. 1056:

> "In short, neither statutory language nor legislative history supports such a broad ranging in-

terpretation of § 1952. And, even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, citing *Bell* v. *The United States,* 349 U.S. 1, 75 S.Ct. 620."

The divergence of opinion in the Southern District of New York among the District Judges as to whether Sec. 180 of the New York Penal Code constitutes bribery under Sec. 1952 (b)(2), the same conflict among the District Judges in the Eastern District of Virginia, see *Louis Pomponio* v. *United States of America* No. 74-1260, cert. pending, should prompt this Court to grant the writ of certiorari and resolve the issue. It is also important for this Court to grant review in order that there may be consistency and uniformity and fairness in the enforcement of the Travel Act. At the present time, in the Southern District of New York the upholding or the dismissal of a Travel Act indictment predicated on Sec. 180 of the New York Penal Code is dependent upon what Judge the case is referred to because of the existing conflict. While the conflict in the Eastern District of Virginia has been resolved by the decision in the instant case, we submit that it is predicated upon a misreading of this Court's decision in *Nardello* v. *The United States, supra,* and the teachings of this Court in *Rewis* v. *The United States, supra,* which should prompt this Court to grant the writ of certiorari.

III.

Under This Court's Decision in Leary v. The United States, 393 U.S. 631, 89 Sup.Ct. 532, Unless This Court Finds as the Court of Appeals Did, That Both Sec. 215 of Title 18, U.S.C. and Article 180 of the New York Penal Code Both Constitute Unlawful Activity Under Title 18, U.S.C. Sec. 1952(b)(2), the Petitioner Would Be Entitled To a New Trial.

The trial Court instructed the jury that both 180 and Sec. 215 of Title 18, U.S.C. could constitute unlawful activity when he instructed:

> "THE COURT: As I have told you because in these two counts you must find that the crime was committed, that is again the crime in the travel in interstate commerce in furtherance of the bribery, the prohibited unlawful activity, one or the other, either in violation of the state law that I have read you as defined there or in violation of the federal banking law." (Tr. 1220)

Thereafter the Court stated (Tr. 1229):

> "It is intent to promote or facilitate all the other words I used in connection therewith, the prohibited unlawful activity as set forth in that statute.
>
> Those two unlawful activities set forth are the bribery of Mr. Zneimer as that word used in the two statutes, the banking statute that I read you and that state statute."

Both Judge Bryan and the Court of Appeals recognized that unless both Sec. 215 of Title 18, U.S.C. and Article 180 of the New York Penal Code constituted unlawful activity within the meaning of the Travel Act a new trial would be required because

it would be impossible to determine on what basis or theory the jury returned its verdict in light of the instructions to the jury on both statutes could constitute unlawful activity under the Travel Act (see p. 17 of the Petition for Certiorari filed by the Co-defendant, Louis Pomponio pending in this Court No. 74-1260). The Court of Appeals recognized this issue but ruled that in light of their holding that both Sec. 215 of Title 18, U.S.C. and Article 180 of the New York Penal Code could each properly invoke the jurisdiction of the Travel Act, there was no requirement for them to pass on this issue. The Court of Appeals stated at footnote 12 (Pet. App. 6a-7a):

> "Defendants take the position that if either the New York commercial bribery law or the federal statute was improperly included in the indictment, the indictment must fall. In view of our disposition of the case, we find it unnecessary to reach this point."

In *Leary* v. *The United States, supra,* this Court stated:

> "It has long been settled that when a case is submitted to a jury on alternative theories the unconstitutionality of any of the theories requires the conviction be set aside. See *Stromberg* v. *California,* 283 U.S. 359, 51 S.Ct. 532. See also, *Mills* v. *United States,* 164 U.S. 644, 17 S.Ct. 210, *Nicola* v. *United States,* 72 F.2d 787 (3rd Cir. 1934), *Yates* v. *United States,* 354 U.S. 298, 312 (1957), and *United States* v. *Johns,* 444 F.2d 58."

Therefore, unless this Court agrees with the expansive construction of the Travel Act, as rendered by the Court of Appeals in this case and specifically,

unless this Court agrees that Sec. 180 of the New York Penal Code and Sec. 215 of Title 18, U.S.C. each constitute unlawful activity within the meaning of the Travel Act, the Petitioner would be entitled to a new trial premised upon the decisions of this Court set forth above.

IV.

The Conflicting Instructions of the Trial Judge in Particular, the Concededly Erroneous Instruction to the Jury That the Petitioner Was Charged with Conspiracy to Violate § 215 of Title 18, U.S.C., Was Reversible Error Depriving the Petitioner of a Fair and Impartial Trial Under This Court's Ruling in Bolenbach v. The United States, 324 U.S. 837, 66 S.Ct. 402, and Chapman v. The State of California, 386 U.S. 23, 87 S.Ct. 824 (1967).

While the only conspiracy the Petitioner was charged with was a conspiracy to violate the Travel Act, Title 18, U.S.C. § 1952, the trial Judge instructed the jury that Petitioner was charged with conspiracy to violate § 215 of Title 18, U.S.C. Objection was made at the conclusion of the charge (Pet. App. 27a), which was overruled by the trial Judge. The brief of the Government in the Court of Appeals admitted that the instruction was erroneous but contended it was not prejudicial error in light of the Court's entire charge.

The erroneous instruction of the trial Judge in this case went to an essential issue and misadvised the jury as to what the Petitioner was being tried for. The jury received two completely contradictory instructions on the role of § 215 of Title 18, U.S.C., and its relationship to the indictment and two contradictory instructions as to what conspiracy the Pe-

titioner was being tried for. This Court in *Bolenbach* v. *the United States, supra,* stated:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue * * *. A charge should not be misleading. See *Agnew* v. *U. S.,* 165 U.S. 36, 17 S.Ct. 235."

In *McFarland* v. *The United States,* 174 F.2d 538 (1949, D.C. Cir.), the Court of Appeals for the District of Columbia stated:

> "If a charge to a jury considered in its entirety, correctly states the law, the incorrectness of one paragraph or one phrase standing alone ordinarily does not constitute reversible error; *but it is otherwise if two instructions are in direct conflict and one is clearly prejudicial for the jury might have followed the erroneous instruction.*"

See *United States* v. *Silver,* 457 F.2d 1223 (10th Cir. 1972). To demonstrate the nature of the prejudice from this erroneous instruction, we call the Court's attention to the fact that the Court of Appeals in their opinion stated that the defendants placed a "too heavy reliance on the role played by § 215 in the indictment and eludes the fact that it served " 'only as a background identification of the unlawful activity' ".

This de-minimus role the Court of Appeals attached to the importance of § 215 of Title 18, U.S.C. to the indictment is at variance with the instruction of the trial Judge *which misadvised the jury and told them that the Petitioner was being charged substantively with a conspiracy to violate § 215 of Title 18, U.S.C. The jury was, therefore, improperly told that the Petitioner was being tried for an offense which, in*

fact, he was not being tried for. This Court in *Chapman* v. *the State of California, supra,* stated that in determining whether error is harmless or prejudicial quoted from its decision in *Fahy* v. *the State of Connecticut,* 375 U.S. 85, 84 S.Ct. 229:

> " 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " * * *

The Court then stated that the standard in determining whether the error was harmless stated:

> "We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we do now, that before a federal constitutional error can be held harmless the Court must be able to declare a belief that it was harmless without a reasonable doubt."

The Petitioner's substantial rights were effected by this improper and erroneaus instruction which misstated the conspiracy for which the Petitioner was on trial and consistent with the ruling above, this Court should grant the write of certiorari and award the Petitioner a new trial.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the Judgment and Opinion of the Fourth Circuit.

Respectfully submitted,

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